Supreme Court, U.S.
FILED
10-372
SEP 15 2010
OFFICE OF THE CLERK

No. 10-_____

In The

Supreme Court of the United States

GREGORY FORRESTER,

Petitioner,

v.

STATE OF ARKANSAS,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Arkansas

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the police can hold a drunk driving suspect in custody incommunicado and prevent him from contacting his attorney in an effort to gather exculpatory evidence in violation of the Fifth and Sixth Amendments to the United States Constitution.

PARTIES TO THE PROCEEDING

The parties to the proceeding are Gregory Forrester, Petitioner, who is a citizen and resident of the State of Arkansas, and the State of Arkansas, Respondent.

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PETITION FOR WRIT OF CERTIORARI

Gregory Forrester respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Arkansas in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Arkansas is reported at *Forrester v. State,* 2010 Ark. 291, 2010 WL 2473241 (Ark. 6-17-10), and was a final order from which comes this appeal. This opinion is reproduced in the appendix herein, p. App. 1

JURISDICTION

The judgment of the Supreme Court of Arkansas was entered on June 17, 2010. The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

FIFTH AMENDMENT

"No person shall . . . be deprived of life, liberty, or property, without due process of law."

SIXTH AMENDMENT

"In all criminal prosecutions, the accused shall . . . have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

ARKANSAS CODE ANNOTATED § 5-65-103. Intoxication, blood alcohol content – Unlawful acts

(a) It is unlawful and punishable as provided in this act for any person who is intoxicated to operate or be in actual physical control of a motor vehicle.

(b) It is unlawful and punishable as provided in this act for any person to operate or be in actual physical control of a motor vehicle if at that time the alcohol concentration in the person's breath or blood was eight-hundredths (0.08) or more based upon the definition of breath, blood, and urine concentration in § 5-65-204.

ARKANSAS CODE ANNOTATED § 5-65-102. Definitions

(2) "Intoxicated" means influenced or affected by the ingestion of alcohol, a controlled substance, any intoxicant, or any combination of alcohol, a controlled substance, or an intoxicant, to such a degree that the driver's reactions, motor skills, and judgment are substantially altered and the driver, therefore, constitutes a clear and substantial danger of physical injury or death to himself and other motorists or pedestrians.

ARKANSAS CODE ANNOTATED § 5-65-107. Persons arrested to be tried on charges – No charges reduced – Filing citiations

(a) A person arrested for violating § 5-65-103 shall be tried on those charges or plead to those charges, and no such charges shall be reduced.

INTRODUCTION

This case presents a pressing issue regarding whether or not the police can hold a drunk driving suspect incommunicado and prevent him from contacting his attorney in an effort to gather exculpatory evidence, in violation of the Fifth and Sixth Amendments to the United States Constitution.

STATEMENT OF THE CASE

The salient facts are that the Petitioner was driving his pickup truck that did not have properly functioning taillights around midnight on December 1, 2007. The officer tried to make a traffic stop for the equipment violation, but the defendant would not immediately stop his vehicle. He drove about six city blocks before finally pulling over, all the while the officer was following him with his lights and siren activated.

When the defendant got out of his vehicle the officer observed his indifferent attitude, lack of reason for not stopping earlier, moderate odor of intoxicants

and glassy eyes. The defendant admitted to drinking a few beers. The defendant's speech was good.

The defendant took three standardized field sobriety tests. The first test was the horizontal eye gaze nystagmus test which the defendant failed by displaying six (6) of six (6) clues. The second test was the walk-and-turn test. The defendant failed this test by displaying four (4) of eight (8) clues. The last test was the one-leg-stand test and he failed that test displaying four (4) out of four (4) clues. The defendant swayed during all the tests and tried to lean on his vehicle for balance on the last test. The officer arrested the Petitioner for DWI #2 and failure to yield to an emergency vehicle. The officer took the Petitioner to the Rogers police department. The officer properly informed the Petitioner of his rights under the implied consent law but the Petitioner refused to take the breath alcohol test. He was then taken to the Benton County jail in Bentonville. It took about fifteen (15) minutes to drive from the Rogers police department to the Benton County jail. The Petitioner was given a traffic citation charging him with DWI, #2.

The arresting officer stated that the defendant looked 6'2" and about 220 pounds. The defendant testified that he was 6'2" and 220 pounds, had drank two (2) twelve-ounce beers that evening. He stated that he always has poor balance and had since he was fairly young. He testified that he never felt intoxicated.

Shortly after arriving at the jail, he twice requested that the jailor allow him to use the telephone to call an attorney. He was told twice by the same

jailor to just shut up. He was never allowed to call an attorney or anyone else. He was released from custody about 9-10 hours later. He was not held for any reason unrelated to the DWI arrest.

The crux of the defendant's case was that he was denied the right to use a telephone to contact an attorney shortly after his arrest, and was thereby prevented from gathering exculpatory evidence and rescinding his initial refusal to take the blood alcohol test offered by the officer.

The Petitioner argued in the trial court that him not being allowed to use the telephone to contact an attorney denied him the ability to mount a defense, and denied him the right to counsel who would have arranged for the gathering of exculpatory evidence. In total, he was denied the right to a fair trial. App. 9 & 11. The trial court denied his motions to suppress and motion to dismiss. App. 9. The appellant was convicted at a bench trial and sentenced for a DWI, 2nd offense on April 27, 2009, in the Benton County Circuit Court. App. 6.

The Petitioner appealed to the Supreme Court of Arkansas and the Court issued its final ruling on June 17, 2010. App. 1

The Supreme Court of Arkansas's ruling noted that the Petitioner was arguing that he was denied the right to contact an attorney after the police investigation was finished. "He argues more specifically that because he was denied the opportunity to speak with counsel, he was unaware that he should (1) attempt to rescind his refusal to submit to the

breathyzer test, (2) have blood and urine tests taken, (3) have a qualified person give the standardized sobriety tests anew, (4) have the sobriety tests videotaped and audio taped, (5) have someone come to the jail to observe him, (6) have photographs taken of his eyes and facial expressions, and (7) obtain an examination by a physician." App. 1

In affirming Petitioner's conviction, the Supreme Court of Arkansas simply ruled that "Forrester offers no convincing authority or argument for the proposition that counsel's absence at the time he was jailed might derogate from his right to a fair trial." App. 1

The Supreme Court of Arkansas was equally succinct in ruling that the argument that the Petitioner was denied the right to gather exculpatory evidence under a due-process analysis was moot because the Petitioner did not specifically request to gather exculpatory evidence. App. 1

REASONS FOR GRANTING THE PETITION

I. The Decision Below Violates The Fifth And Sixth Amendments To The United States Constitution By Allowing Police To Hold A Drunk Driving Suspect Incommunicado And Prevent Him From Contacting His Attorney In An Effort To Gather Exculpatory Evidence

The ruling in this case will affect the cases of all those arrested for drunk driving in every jurisdiction.

According to the Mothers Against Drunk Driving website, in 2006, 1.46 million people were arrested in the United States for drunk driving. www.madd.org. That is 1 out of every 139 licensed drivers.

The Petitioner's complaint is that he was not allowed to use a telephone to call an attorney after the completion of the police investigation for drunk driving; thus, he was prevented from gathering exculpatory evidence and was denied a fair trial. In an appeal from the lower court, the Petitioner asked the Circuit Court to suppress the evidence and dismiss the charges based upon the fact that the Defendant was not allowed to gather exculpatory evidence, not allowed the ability to rescind his refusal to take the breath test, was denied the right to timely contact defense counsel, and was denied the right to use the telephone after his arrest. App. 9 & 11. The Benton County Circuit Court denied the Petitioner's motion to suppress the evidence and denied the request to dismiss the charges. App. 6 & 11.

A defendant has the right to the assistance of counsel under the Sixth Amendment at any critical stage of the prosecution. *United States v. Wade*, 388 U.S. 218 (1967), *Kirby v. Illinois*, 406 U.S. 682 (1972). This is normally after the initiation of adversary judicial proceedings – whether by way of formal charge, preliminary hearing, indictment, information or arraignment. In general terms, the point at which the right to counsel attaches is when "formal charges" have been initiated or when "the government has committed itself to prosecute." *Roberts v. State of Maine*,

48 F.3d 1287 (1st Cir. 1995). The Petitioner's right to counsel should have attached when the initial police investigation was concluded and at the time he was placed in jail. There needs to be a specific expansion of the *Wade-Kirby* cases under the Sixth Amendment for drunk driving arrests due to the limited time frame for collecting exculpatory evidence.

In Arkansas, the mere "arrest" of a person for DWI triggers an automatic trial or guilty plea requirement. Prosecutors do not generally charge individuals with DWI; the police officer arresting a person triggers the initiation of judicial proceedings. Arkansas Code Annotated 5-65-107 states that "persons arrested for violation of the Arkansas DWI law shall be tried on those charges or plead to such charges, and no such charges shall be reduced." *Baldridge v. Cordes*, 350 Ark. 114, 85 S.W.3d 511 (2002). In *Baldridge*, a state trooper arrested a person who was riding a horse for DWI. A horse is not a motor vehicle under the DWI statute. The trooper attempted to change the charge to drinking in public under a separate statute. The Supreme Court of Arkansas ruled that this was unlawful and it was proper to try Baldridge for DWI. Baldridge was required to be tried because he was "arrested" for an alleged violation of the DWI statute. Under this statutory scheme, the adversarial judicial proceeding under the *Wade-Kirby* cases started with Petitioner's arrest.

The real issue in this case is the determination of the value of a lawyer to a person arrested for drunk driving. The American criminal justice system

is based upon an adversarial system. Both sides marshal their forces and show up for trial before an unbiased fact finder. After the presentation of everyone's evidence, a decision is made as to the defendant's guilt. The evidence in this case was stacked in the prosecution's favor by the police officer being allowed to hold the Petitioner incommunicado and keeping him from gathering any exculpatory evidence. The criminal trial in this case was a mere formality with its outcome determined within hours of the Petitioner's arrest.

As the court noted in *Halvorsen v. Baird*, 146 F.3d 680 (9th Cir. 1998), "There is a well established tradition against holding prisoners incommunicado in the United States." (Citing *State v. Newton*, 291 Or. 788, 636 P.2d 393 (1981), "allowance of a telephone call following arrest has become traditional and incommunicado incarceration as inconsistent with American notions of ordered liberty").

There is no law that requires a police officer to conduct any type of test on a person arrested for DWI. This would include both standardized field sobriety tests and a chemical test to determine if the person is under the influence of drugs or alcohol. Under the facts of this case, a police officer made an arrest and placed a person incommunicado in jail until the time to gather exculpatory evidence had lapsed. In essence, the prosecution marshaled its resources and then prevented the defendant from marshalling his. A fair trial under these circumstances is not likely.

Specific examples of cases where a person arrested for drunk driving and then unlawfully prevented from contacting an attorney are found in numerous cases. The Petitioner cited and argued the following examples in the trial court and the Supreme Court of Arkansas: *City of Tacoma v. Heater*, 67 Wash.2d 733, 409 P.2d 867 (1966); *State v. Hill*, 277 N.C. 547, 178 S.E.2d 462 (1971); *State v. Carr*, 128 Idaho 181, 911 P.2d 774 (Idaho App. 1995); *McNutt v. Superior Court*, 133 Ariz. 7, 648 P.2d 122 (Ariz. 1982) and *State v. Rosengren*, 199 Ariz. 112, 14 P.3d 303 (Ariz. App. 2000). The Supreme Court of Arkansas made no effort to analyze any of these cases nor try to distinguish them on the facts or the law.

In *City of Tacoma v. Heater*, the police would not let the defendant make a phone call to an attorney for four hours after his arrest for drunk driving. In reversing the defendant's conviction, the court stated, "The denial of counsel at this point prevented the defendant's effective preparation for his defense to the charge against him. It was necessary for him to present evidence showing that he was not under the influence of intoxicating liquor at the time of his arrest. A most effective way to present such evidence would be through disinterested witnesses who could observe his condition soon after his arrest or after he had been booked for the crime, and by a blood test administered by a doctor. The evidence of intoxication dissipates with the passage of time. The 4-hour rule imposed by the police regulation recognizes that after 4 hours a person under the influence of intoxicating

liquor will have reached a state of sobriety so that he is safe to be released and may use a telephone." *City of Tacoma* at 739.

In *State v. Hill*, in reversing the defendant's drunk driving conviction the court stated, "Before we could say that defendant was not prejudiced by the refusal of the jailer to permit his attorney to see him we would have to assume both the infallibility and credibility of the State's witnesses as well as the certitude of their tests. Even if the assumption be true in this case, it will not always be so." And, "Defendant has been deprived of a fundamental right which the constitution guarantees to every person charged with crime. For that reason, the prosecution against him must be dismissed." *Hill* at 555, 556.

In *McNutt v. Superior Court*, in reversing the defendant's conviction for drunk driving the court held that, "Dismissal of the case with prejudice is the appropriate remedy because the state's action foreclosed a fair trial by preventing petitioner from collecting exculpatory evidence no longer available." *McNutt* at 10. The prosecution offered no legitimate reason for not allowing a person arrested for drunk driving from contacting an attorney.

The Petitioner is relying most heavily on the case of *State v. Carr*. The *Carr* court precisely framed the question: "The issue presented in this case, however, is whether Carr's constitutional rights were violated when the State denied her request to telephone her attorney *following* the administration of the State's

BAC test." [Emphasis in the original.] *Carr* at 183. *Carr* presented the proper analytical framework under the due process clause as laid out in *Mathews v. Eldridge*, 424 U.S. 319 (1976). The *Mathews* test for determining whether state action violates procedural due process requires a court to consider three distinct factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the existing procedures used and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

As to the first criteria under *Mathews*, "the private interest," the *Carr* court stated that denying Carr the use of the telephone to contact her attorney denied her the means by which she could establish her defense. Under the second criteria, "the risk of erroneous deprivation," the court denying the individual arrested for DUI access to a telephone upon request until well after alcohol in the bloodstream had dissipated, caused a great risk of erroneous deprivation of the arrestee's interest in obtaining evidence in her defense. And finally, under the third criteria, "the government's interest," the state failed to demonstrate any reason for refusing to allow Carr to call her attorney for several hours after her arrest.

The *Carr* court held that all three of the *Mathews* criteria weighed in favor of Carr being allowed to

telephone her attorney after the police investigation was concluded. The court noted that "[I]ndeed, without timely access to a telephone, there is little likelihood of successfully challenging the State's evidence of intoxication." Furthermore, "[W]e conclude that, by denying Carr's request to telephone her attorney and holding her incommunicado for an unreasonable time following administration of the State's BAC test, the State violated Carr's right to due process." *Carr* at 185.

The *Carr* court answered the question, "What value is a lawyer to a person arrested for drunk driving?" The court listed the various things that a lawyer could do for the client. The lawyer could arrange for a photograph to be taken to demonstrate that the arrestee's eyes were not bloodshot but were clear and white; prepare a tape recording to demonstrate that the arrestee had clear speech; videotape the arrestee to show that he or she has balance and is able to walk a straight line; perform a gaze nystagmus test to show smooth eye pursuit at all angles; or simply serve as a witness who observed the aforementioned characteristics of sobriety.

Similar to what the court in *Carr* listed, the Petitioner filed a pre-trial motion listing what an attorney could have done for him while he was in custody, including telling the defendant to rescind his initial refusal and take any and all alcohol or drug tests that the officer wanted; have a blood and urine sample taken by a qualified person and submit it to a qualified lab for independent analysis of alcohol and

drug content; have a qualified person give the defendant standardized field sobriety tests; have an immediate family member or close friend come to the jail and observe the defendant to see if he appeared intoxicated, sick or sober; have photographs/video made of the defendant's eyes and facial expression; have someone make a video or audio tape of the defendant to see how he did on the independent field sobriety tests to see if he had slurred speech, swayed, stumbled or had any difficulty doing any task; and have the defendant examined by a physician. App. 13-14.

In *State v. Rosengren*, the court observed that "the right to counsel is an extension of the doctrine that defendants have the right to gather independent exculpatory evidence." *Rosengren* at 117, citing *State v. Transon,* 186 Ariz. 482, 485, 924 P.2d 486, 489 (1996).

As a practical matter, the most damaging evidence against the Petitioner was his refusal to take the blood alcohol test as properly requested by the arresting officer. The Petitioner offered no logical explanation as to why he refused the test. This refusal to take a BAC test was admissible pursuant to *South Dakota v. Neville*, 459 U.S. 553 (1983) and *Weaver v. City of Fort Smith*, 29 Ark. App. 129, 777 S.W.2d 867 (1989).

The Petitioner's predicament is illustrated in the majority opinion in *Gideon v. Wainwright*, 372 U.S. 335 (1963), referencing Justice Sutherland's

comments in *Powell v. Alabama*, 287 U.S. 45 (1932). Justice Sutherland's comments were to the effect that even the rich are unprepared to defend against the power of the prosecutor without counsel because "[H]e requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." *Gideon* at 344, 345. No truer words were ever spoken.

When the Petitioner was prevented from calling his attorney, he remained unaware that a very damaging piece of evidence could be used against him – that of his refusal to take the alcohol breath test. Any lawyer would have told him to immediately rescind his refusal because it is common sense that two regular beers will not make a 220 pound man intoxicated. The arresting officer did not inform him that his refusal would be used against him at trial on the issue of consciousness of guilt.

It is important to note what the Petitioner is not seeking. He is not asking that an arrested suspect be let out of jail to gather evidence; rather, the Petitioner is asking that other people be allowed to gather exculpatory evidence on his behalf. There is no request to mandate chemical testing at the state's expense. The Petitioner wanted the right to use a telephone to contact an attorney so that the attorney could give him legal advice and help arrange for the collection of exculpatory evidence. This is a right that any suspect would have to exercise on their own volition.

Since the Petitioner is 6'2" tall and weighs 220 pounds, and only consumed two twelve-ounce beers, he could not have been intoxicated at the time of his arrest. Since his speech was reported as good, there was no typical bad driving, and he had the presence of mind to try to call an attorney, he claims that he was not intoxicated and now stands wrongfully convicted because he did not receive a fair trial.

When reading the Supreme Court of Arkansas opinion in this case, one comes away with the sense that the Petitioner cited no cases in support of his position. The exact words of the court were, "Forrester offers no convincing authority or argument for the proposition that counsel's absence at the time he was jailed might derogate from his right to a fair trial." The Supreme Court of Arkansas was equally succinct in ruling that the argument that the Petitioner was denied the right to gather exculpatory evidence under a due-process analysis was moot because the Petitioner did not specifically request to gather exculpatory evidence.

What would have happened had the Petitioner, instead of asking to call a lawyer, had instead requested to call his physician so that he could come to the jail and take a blood or urine sample from him? Does anyone really believe that the jailor would have allowed that phone call? Why would the jailor let him call a physician but not an attorney?

The Supreme Court of Arkansas stated that the defendant's due process argument was moot because

he did not make a specific request to gather exculpatory evidence. At what point would someone make such a request and who would assist the Petitioner? What kind of stare would one get from a jailor when the drunk driving suspect stood up and said, "I would now like to gather some exculpatory evidence."? What average citizen even knows what type of exculpatory evidence would exist in a drunk driving case?

The opinion by the Supreme Court of Arkansas creates a conflict between the courts of several states on the issue of the due process rights of a person arrested for drunk driving as well as the right to counsel in these type cases. The application of federal law should be uniform throughout the states. The United States Supreme Court needs to settle these constitutional questions that affect almost one and a half million individuals arrested for drunk driving every year.

In addition, because Arkansas has a statutory triggering mechanism that mandates that the "arrest" of a drunk driving suspect automatically starts the judicial proceedings, which cannot be terminated by the police or the prosecutor, the right to counsel under the Sixth Amendment attaches at this "critical stage" of the proceedings. This "critical stage" under the facts of this case is after the conclusion of the police investigation but while the suspect is in police custody.

The issue of when, if ever, there is a "critical stage" under the Sixth Amendment right to counsel in

a drunk driving case has been around for some time. In *Nyflot v. Minnesota Commissioner of Public Safety*, 474 U.S. 1027 (1985), Justices White and Stevens dissented from the dismissal of the appeal for want of a substantial federal question. The Justices noted the strong split of authority in the lower courts of whether a drunk driving suspect had a federal constitutional right to counsel before the suspect had to decide to either take, or not take, a chemical test as requested by the arresting officer. They urged their brethren to settle the issue.

In 1998, the Arizona Court of Appeals held that a person has a federal constitutional right under the Sixth Amendment to contact counsel before an alcohol breath test if that contact does not delay the test. *State v. Sanders*, 194 Ariz. 156, 978 P.2d 133 (1998). The Arizona Supreme Court denied review and then Arizona Attorney General Janet Napolitano filed a Petition for Writ of Certiorari in the United States Supreme Court. In the Petition, found at 1999 WL 33640045, she noted an expanded split of authority from the time of *Nyflot* in 1985. The Petition was denied at 528 U.S. 982 (1999).

Arizona takes the minority view that a person has the right to counsel before deciding to take a chemical test. Arkansas follows the majority view that a person does not have the constitutional right to counsel before taking a chemical test. *Wells v. State*, 285 Ark. 9, 684 S.W.2d 248 (1985). The problem in this case is that now Arkansas has taken this view to

the extreme by not allowing the right to counsel even after the police investigation has concluded.

This case is about more than just chemical testing for drugs or alcohol in a drunk driving case. Arkansas, like all other jurisdictions, has at least two ways to prove a drunk driving case. Arkansas statute § 5-65-103 is in two parts:

(a) It is unlawful and punishable as provided in this act for any person who is intoxicated to operate or be in actual physical control of a motor vehicle;

(b) It is unlawful and punishable as provided in this act for any person to operate or be in actual physical control of a motor vehicle if at that time the alcohol concentration in the person's breath or blood was eight-hundredths (0.08) or more based upon the definition of breath, blood, and urine concentration in § 5-65-204.

A person can be convicted of drunk driving without any type of chemical test. The prosecution only needs an alcohol breath test to prove a *per se* 0.08% violation which is in part (b) of the DWI statute. It does not really matter whether a person has slurred speech, poor balance or bad driving in a *per se* prosecution. The proof only needs to be related to whether the suspect is over the blood alcohol limit at the time of driving or is in actual physical control of the motor vehicle. In this case, since there was no blood alcohol test, the state had to proceed under section (a) of the DWI statute. Just about everything is relevant in this type prosecution, (i.e., slurred speech, manner of driving, defendant's physical abilities, etc.) That is

why it was necessary to rebut the prosecution's case that the defendant was physically and mentally impaired to the point of intoxication. Arkansas statute § 5-65-102 states that ""Intoxicated" means influenced or affected by the ingestion of alcohol, a controlled substance, any intoxicant, or any combination of alcohol, a controlled substance, or an intoxicant, to such a degree that the driver's reactions, motor skills, and judgment are substantially altered and the driver, therefore, constitutes a clear and substantial danger of physical injury or death to himself and other motorists or pedestrians." It becomes obvious how critical it is for other persons to see and assess the defendant's level of impairment or intoxication irrespective of the fact of any chemical testing. This is the type of exculpatory evidence that the defendant needed but was prevented from gathering.

This case presents a substantial federal question, with a significant split of authority, on an issue of national importance that affects a large number of arrests each year. Since *Nyflot* in 1985, literally millions and millions of people have been arrested for drunk driving in the United States. Some get the benefit of counsel at the time of their arrest and some do not.

The United States Supreme Court should rule that in a drunk driving case, that after the initial police investigation is concluded, the arrested person should have a reasonable opportunity to contact his attorney so that the attorney could arrange for the

collection of any exculpatory evidence, and to provide any necessary legal advice and assistance. Such a uniform rule would prevent the police from holding a drunk driving suspect incommunicado and denying him the right to telephone his attorney, who then would attempt to gather exculpatory evidence that would insure that he would receive a fair trial.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Cite as 2010 Ark. 291

SUPREME COURT OF ARKANSAS

No. CR09-872

GREGORY FORRESTER, APPELLANT, VS. STATE OF ARKANSAS, APPELLEE,	**Opinion Delivered** June 17, 2010 APPEAL FROM THE BENTON COUNTY CIRCUIT COURT, NO. CR2008-789-1, HON. ROBIN FROMAN GREEN, JUDGE, AFFIRMED.

JIM HANNAH, Chief Justice

Gregory Paul Forrester appeals an order and judgment of the Benton County Circuit Court convicting him of violating Arkansas Code Annotated section 5-65-103 (Supp. 2007), operating a motor vehicle while intoxicated. Forrester asserts that the circuit court erred in denying his motion to dismiss based on denial of his right to advice of counsel. We affirm the decision of the circuit court. Our jurisdiction is pursuant to Arkansas Supreme Court Rule 1-2(b).

Shortly after midnight on December 1, 2007, Officer Bryan Hanna of the Rogers Police Department pulled Forrester over because one of his taillights was not working. Hanna testified that Forrester took a long time to pull over and that Forrester's eyes were glassy and he smelled of intoxicants. Forrester was

arrested, transported to the police station, presented with an implied consent rights form, and asked to submit to a breathalyzer test.[1] Forrester refused to take the test and was then transported to the Benton County jail. According to Forrester, within five minutes of his arrival at the jail, he requested an opportunity to call counsel and was refused. Forrester asserts that he made an additional request to call counsel that was also denied.

In the circuit court, Forrester moved for suppression of the evidence the State collected at the time of his arrest, and he also moved for dismissal. He argued that by denying him his right to contact counsel, he was denied the opportunity to gather exculpatory evidence. The circuit court, citing *Hudgens v. State*, 324 Ark. 169, 919 S.W.2d 939 (1996) as "directly on point," overruled Forrester's objections and denied his motion to suppress and motion to dismiss.

On appeal, Forrester argues that the circuit court "erred in denying his motion to dismiss for violation of the right to communicate with counsel." Forrester

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[1] Pursuant to Arkansas Code Annotated section 5-65-202(a) (Repl. 2005), any person operating a motor vehicle impliedly consents to submit to a chemical test to determine alcohol or controlled substance level in his or her breath or blood. Refusal to submit to the chemical test may result in suspension or revocation of the person's driver's license by the Office of Driver Services. *See* Ark. Code Ann. § 5-65-205 (Supp. 2007). A finding of intoxication at the time of arrest may result in suspension or revocation of the person's driver's license by the Office of Driver Services. *See* Ark. Code Ann. § 5-65-104 (Repl. 2005).

asserts that because he was not allowed to contact counsel, he was unaware of the legal and practical consequences of refusing to take the breathalyzer test. He argues more specifically that, because he was denied the opportunity to speak with counsel, he was unaware that he should (1) attempt to rescind his refusal to submit to the breathalyzer test, (2) have blood and urine tests taken, (3) have a qualified person give the standardized sobriety tests anew, (4) have the sobriety tests video taped and audio taped, (5) have someone come to the jail to observe him, (6) have photographs taken of his eyes and facial expressions, and (7) obtain an examination by a physician.

Forrester first addresses the right to counsel. He asserts the right to counsel arose after the test was offered and he was jailed and refused permission to contact counsel. He admits that there is no right to confer with counsel prior to taking the breathalyzer test. This court so held in *Hudgens,* 324 Ark. at 173, 919 S.W.2d at 941 (citing *Marx v. State,* 291 Ark. 325, 724 S.W.2d 456 (1987)). In *Marx,* this court relied on *Wells v. State,* 285 Ark. 9, 684 S.W.2d 248 (1985), and the analysis in *Wells* more specifically assists us in this case. In that case, this court concluded that the pretrial procedure of submitting to a breathalyzer test is not a critical stage in the criminal proceedings subject to the right to counsel because it is a scientific test that presents minimal risk that counsel's absence might derogate from the defendant's right to a fair trial. *Wells,* 285 Ark. at 12, 684 S.W.2d at 249 (quoting *United States v. Wade*, 388 U.S. 218, 227-28

(1967) and citing *Holmberg v. 54-A Judicial District Judge,* 231 N.W.2d 543 (Mich. Ct. App. 1975) (applying *Wade* to a breathalyzer test)). Clearly, there was no right to counsel at the time the breathalyzer test was offered. And Forrester offers no convincing authority or argument for the proposition that counsel's absence at the time he was jailed might derogate from his right to a fair trial.[2]

Forrester next argues that he had a right to gather exculpatory evidence under the United States Constitution, the Arkansas Constitution, and Arkansas Rule of Criminal Procedure 8.3.[3] Citing *Hudgens,* he states that, while he had no right to be let out of jail to obtain exculpatory evidence, he did have the right to have others come to the jail to collect such evidence. This court in *Hudgens* stated that because

---

[2] Forrester argues on appeal that the refusal to submit to the breathalyzer test resulted in prejudice in that it gave rise to "an inference at trial that the reason he did not take the test was that he thought himself to be intoxicated." The refusal to submit to a chemical test can be properly admitted as circumstantial evidence showing a knowledge or consciousness of guilt. *Medlock v. State,* 332 Ark. 106, 109, 964 S.W.2d 196, 198 (1998). But, Forrester does not develop this argument. Failure to develop an argument precludes our review on the issue on appeal. *See Davis v. State,* 374 Ark. 368, 375, 291 S.W.3d 164, 169 (2009).

[3] Arkansas Rule of Criminal Procedure 8.3 concerns informing a defendant of certain rights at the first appearance. Because Forrester was being held in jail for operating a motor vehicle while intoxicated pending sobriety and release, he could not be in jail awaiting trial. No first appearance is at issue, and Rule 8.3 is inapplicable.

Hudgens refused the breathalyzer test, he had no right to an independent test. *Hudgens,* 324 Ark. at 174, 919 S.W.2d at 941. But, Forrester did not request an opportunity to gather exculpatory evidence. As such, the issue of whether a separate due-process right arises under the United States Constitution and the Arkansas Constitution is moot and need not be addressed. *See, e.g., Allison v. Lee County Election Comm'n,* 359 Ark. 388, 198 S.W.3d 113 (2004).

Affirmed.

CORBIN, J., not participating.

IN THE CIRCUIT COURT OF
BENTON COUNTY, ARKANSAS
DIVISION I

STATE OF ARKANSAS PLAINTIFF

VS.

GREGORY PAUL FORRESTER DEFENDANT

JUDGMENT AND ORDER

On this 7th day of April, 2009, the above-styled case comes before the court, the State of Arkansas appearing by its counsel, Jim Clark, and the Defendant appearing in person and by his counsel, Doug Norwood, and from the evidence presented, statements of counsel, and other things and matters before the court, the Court finds, orders, and adjudges the following:

1. That the Court finds the Defendant is guilty of Driving While Intoxicated Second Offense, Ark. Code Ann. § 5-65-103, an unclassified misdemeanor.

2. That on the charge of Driving While Intoxicated Second Offense, the Defendant is sentenced as follows:

a. $300.00 court costs;

b. $450.00 fine;

c. Sixty (60) days jail, with fifty-three (53) days suspended and credit for one (1) day already served. The suspended days in jail is conditioned

upon assessment and treatment for alcohol abuse at OGC within 60 days;

3. That the charge of Failure to Yield to an Emergency Vehicle is dismissed;

4. All the above sentencing requirements are stayed pending any Arkansas Court of Appeals or Arkansas Supreme Court Appeal;

5. That during the duration of any Appeal the following requirements are to be adhered to by the Defendant:

a. There cannot be any violations of the federal, state or local laws while he remains free on his own recognizance or prior bond agreement;

b. Must have a valid driver's license or permit before driving;

c. That he cannot drive a vehicle if he has consumed any amount of alcohol; and

d. The Benton County Court Clerk Office is to be notified of any changes to his address, telephone numbers or employment status.

IT IS SO ORDERED.

/s/ Robin Green
Hon. Robin Green, Circuit Judge

Dated: 5-06-09

IN THE CIRCUIT COURT OF BENTON COUNTY, ARKANSAS

Division I

STATE OF ARKANSAS, PLAINTIFF, VS GREGORY PAUL FORRESTER, DEFENDANT.	)	NO. CR 2008-0789-1

TRANSCRIPT OF THE COURT'S RULING

Proceedings before the Honorable Robin F. Green, Judge of the Circuit Court, First Division, Nineteenth Judicial District, on the 7th day of April, 2009.

APPEARANCES

Attorney for the State:
JIM CLARK,
Deputy City Attorney,
301 W. Chestnut St.
Rogers, Arkansas 72756

Attorney for the Defendant:
DOUG NORWOOD,
Attorney at Law
P.O. Box 1960
Rogers, Arkansas 72757

* * *

[168] THE COURT: I – I am dismissing the failure to yield charge. It should have been properly charged as fleeing.

MR. NORWOOD: Okay, Now, the objections that I filed, I Listed five. I missed actually – accidentally put two fours. But the first four, you are denying all four of those specific objections?

THE COURT: Okay. I specifically am finding – I am denying your motion to dismiss based – paragraph one, he was not allowed the right to gather exculpatory evidence based upon the precedent set in Hudgens, denying that motion, likewise for paragraph number two, number three, number four. Second number four, I am granting that motion to dismiss –

MR. NORWOOD: Okay. So, the first four –

THE COURT: – the charge of failure to yield.

MR. NORWOOD: So, the first four that are properly numbered four, that last one should be five. Those first four, the Court is denying all four of those individually.

THE COURT: That's correct, sir.

MR. NORWOOD: Thank you, Your Honor. Just wanted to clarify the record.

(State's Exhibit No. 1 was marked herein for identification.)

MR. CLARK: Your Honor, at this time I have a transcript of a judgment of the Rogers District Court

* * *

IN THE CIRCUIT COURT OF
BENTON COUNTY, ARKANSAS
BENTONVILLE, ARKANSAS

STATE OF ARKANSAS PLAINTIFF

No. CR-2008-789-1 (Appeal)

GREGORY PAUL FORRESTER DEFENDANT'S

SPECIFIC OBJECTIONS
AND BRIEF IN SUPPORT

The defendant has five specific objections in this matter.

1.) He was not allowed the right to gather exculpatory evidence.

2.) He was not allowed the ability to rescind his refusal to take the breath test requested by the police officer.

3.) He was denied the right to timely contact defense counsel.

4. He was denied the right to use a telephone after his arrest in violation of due process of law and ARCrP 8.3(a)(iii).

4.) There is insufficient evidence of violation of the failure to yield to emergency vehicles statute. A.C.A. 27-51-901.

The constitutional provision to support the specific objections are as follows:

> Federal Sixth Amendment right to counsel and to gather exculpatory evidence.
>
> Federal Fifth Amendment due process of law.
>
> Arkansas Constitution, Article 2, Sections 8 & 10.

The Arkansas Rules of Criminal Procedure Rules that support the specific objections are as follows:

> ARCrP 8.3(a)(iii): "he has a right to communicate with his counsel, his family, or his friends, and that reasonable means will be provided for him to do so."

The cases used to support the specific objections are as follows:

> *State v Bonvie*, 936 A.2d 1291 (Vt. 2007)
> *State v Rosengren*, 14 P.3d 303 (Ariz. App. 2000)
> *Burrell v State*, 483 S.E.2d 679 (Ga. App. 1997)
> *State v Carr*, 911 P.2d 774 (Idaho App. 1995)
> *State v Madden*, 908 P.2d 587 (Idaho App. 1995)
> *State v Hill*, 178 S.E.2d 462 (N.C. 1971)
> *City of Tacoma v Heater*, 409 P.2d 867 (Wash. 1966)

The specific remedy that the defendants seeks is suppression of all the states evidence related to the specific objections and dismissal of all charges based upon the specific objections.

On December 1, 2007, the defendant was stopped for having a tail light out. After the officer attempted the traffic stop, the defendant did not immediately

stop his vehicle. These facts are not in dispute, and the defendant does not argue that there was insufficient reason for the officer to make the traffic stop. The officer should have charged the defendant with fleeing, but instead charged him with failing to yield to an emergency vehicle. A.C.A. 27-51-901. This charge should be dismissed for lack of sufficient proof pursuant to the reasoning in the case of *Burrell v State*, 483 5.E.2d 679 (Ga. App. 1997).

The defendant testified that after his arrest, he asked to make a phone call to a lawyer on two occasions. Had he been able to speak to an attorney, that attorney would have told him that, by not taking the breath test as requested by the officer, that fact could be used against him at trial on the issue of consciousness of guilt. It would also mean that his drivers license would be suspended for six months instead of 4 months under the VICL statute. But most importantly, he would be waiving his statutory right to get a second independent blood alcohol test for his defense. An attorney would have done all the following for the defendant while he was in custody:

1. Told the defendant to rescind his initial refusal and take any and all alcohol or drug tests that the officer wanted.

2. Had a blood and urine sample taken by a qualified person and submitted to a qualified lab for independent analysis of alcohol and drug content.

3. Had a qualified person to give the defendant standardized field sobriety tests.

4. Had some immediate family member or close friend to come to the jail and observe the defendant to see if he was intoxicated, sick, or sober.

5. Had photographs/video made of the defendants eyes and facial expression.

6. Had someone make a video or audio tape of the defendant so see how he did on the independent field sobriety tests and to see if he had slurred speech, or swayed, or stumbled, or had any difficulty doing any task.

7. Had the defendant examined by a physician.

8. Had the defendant released on bail in a timely manner. An attorney might have been able to contact a judge and had the defendant released from custody.

Since the very nature of DWI involves rapidly diminishing evidence, due process requires that a person be given a timely opportunity to meet the state's proof with evidence of sobriety. For all practical purposes, since the defendant was denied the right to use the telephone, he was denied his rights under ARCrP 8.3(a)(iii), the ability to gather exculpatory evidence under constitutional law, his right to counsel, and the right to rescind his initial refusal

and get the protection afforded him in A.C.A. 5-65.204.

In this case, the defendant testified that he only had two alcoholic drinks. (Two 12 oz. containers of beer) Since the defendant weighs 215-220 pounds, it would not be possible for him to be intoxicated on alcohol or be .08% or more during the time frame that he was driving the motor vehicle.

The right to be able to contact counsel by telephone in DWI cases is not a new issue. *City of Tacoma v Heater*, 409 P.2d 867 (N.C. 1971) and *State v Hill*, 178 S.E.2d 462 (Ariz. App. 2000), along with *Carr, Madden, Hill, & Heater*, detail how and why it is essential for a person to be able to contact defense counsel quickly in a DWI arrest. Without some outside help, the prosecution's case will stand unrebutted.

Since the defendant initially refused to take the test offered by the officer, that fact could be used to establish consciousness of guilt. Even if Arkansas ultimately does not recognize the concept of rescinding the refusal, the mere fact that the defendant attempted to rescind the refusal could be used as evidence in a trial to negate the consciousness of guilt aspect. Would a member of the general public realize the importance of this legal analysis without benefit of counsel?

Counsel has not been able to locate an Arkansas case concerning the right to rescind a refusal to take a BAC test of the officers choosing. However, the

court should follow the analysis in *State v Bonvie*, 936 a.2d 1291 (Vt. 2007).

The evidence gather in this DWI case should be suppressed and this case should be dismissed. The charge of failure to yield to an emergency vehicle should be dismissed based upon lack of evidence.

Respectfully submitted

/s/ Doug Norwood

Doug Norwood,
Ark Bar #87-097
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PO Box 1960
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CERTIFICATE OF SERVICE

I have on this date mailed a copy of this pleading to Hon. Jim Clark, Deputy City Attorney, City of Rogers Administration Building, Rogers, Arkansas, 72756

/s/ Doug Norwood

Doug Norwood,
March 9, 2009

No. 10-372

In The
Supreme Court of the United States

GREGORY FORRESTER,

Petitioner,

v.

STATE OF ARKANSAS,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Arkansas

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Under the Sixth or Fourteenth Amendment, does a defendant arrested and jailed for driving while intoxicated have a right to counsel or to contact counsel to aid in the collection of possibly exculpatory evidence prior to his release on citation pending sobriety some nine hours later and prior to an appearance before a judicial officer?

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OPINION BELOW

The State of Arkansas, the Respondent, opposes the petition of Gregory Forrester requesting a writ of certiorari to review the judgment of the Arkansas Supreme Court affirming his conviction for driving while intoxicated. *Forrester v. State*, 2010 Ark. 291, ___ S.W.3d ___.

JURISDICTION

While the Court may have discretionary jurisdiction pursuant to 28 U.S.C. §1257(a) to review a Sixth Amendment claim presented by the petition, the Respondent disputes that this Court has discretionary jurisdiction to review a distinct Sixth Amendment right-to-counsel attachment claim or any due-process claims under the Fourteenth Amendment because any such claims the Petitioner raises in his Question Presented are not properly before the Court under that statute.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part, that "[i]n all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence."

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in pertinent

part, that no State shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The Respondent relies on the description of the proceedings contained in the opinion below and incorporates that description by reference, Petitioner's Appendix ("Pet. Appx.") at 1-5, with the following additional comments concerning the Petitioner's recitation of the case. The rights of which the Petitioner was advised under the Arkansas Implied Consent Law are contained on a form initialed and signed by him which appears in the Respondent's Appendix. The Respondent disagrees with the Petitioner's description of his jailing as being held incommunicado. As the court below explained, he was held pending sobriety and release, not awaiting trial, making inapplicable the state criminal-procedure rules governing first appearances on which he in part relied below. Pet. Appx. at 4 & n.3.

REASONS FOR DENYING THE WRIT

What the Petitioner asks for – the right to contact an attorney to aid in the collection of exculpatory evidence shortly after (and certainly within a matter of hours of) his arrest and jailing for driving while

intoxicated (DWI) – is easy enough to gather from his petition. *E.g.*, Pet. at 7-8, 15, 18-19, 20-21. The Respondent, however, cannot readily discern what particular constitutional guarantee or doctrine the Petitioner believes compels such a right. For example, while both his Question Presented and Reasons for Granting the Writ invoke the Fifth and Sixth Amendments, the due-process clause of the former simply does not apply as against the Respondent. *See, e.g.*, *Dusenbery v. United States*, 534 U.S. 161, 167 (2002). Although, of course, the like clause of the Fourteenth Amendment does apply, *see id.*, the Arkansas Supreme Court did not reach and was not properly presented with a claim as to it. And, while a right-to-counsel claim under the Sixth Amendment may be presented, the petition by turns asks that it be decided as a matter of attachment of the right or as necessary to a critical stage of the criminal proceedings without regard to attachment. Moreover, the petition conflates the right to counsel with what appears to be a distinct due-process claim. Despite uncertainty in the petition, it should be denied as to either a due-process or a right-to-counsel claim under the Fourteenth and Sixth Amendments for the many reasons that follow.

1. The Petitioner's Right-To-Counsel Attachment And Due-Process Claims Were Not Decided By Or Properly Presented To The Arkansas Supreme Court.

"With very rare exceptions, [this Court has] adhered to the rule in reviewing state court judgments

under 28 U.S.C. § 1257 that [it] will not consider a petitioner's federal claim unless [the claim] was either addressed by, or properly presented to, the state court that rendered the decision [it] ha[s] been asked to review." *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (per curiam) (citation and quotations omitted). In order to be properly presented to the state court, a federal claim must be presented "with fair precision and in due time[.]" *Id.*, 520 U.S. at 87 (citation and quotations omitted). The burden is on the Petitioner to show that his claims were properly presented to the Arkansas Supreme Court, *see*, *e.g.*, *id.*, 520 U.S. at 86; *see also* Supreme Court Rule 14.1(g)(i), and he has not met it here.

The Arkansas Supreme Court, relying on its own precedent from 25 years earlier, answered only the Sixth Amendment question whether the decision to submit to a breathalyzer test was a critical stage in the criminal proceedings which without counsel would risk derogation of a defendant's right to a fair trial. Pet. Appx. at 3-4. Pointing to that earlier case and its reliance on *United States v. Wade*, 388 U.S. 218 (1967), the Arkansas Supreme Court again concluded that there was no right to counsel at the time the Petitioner was offered a breathalyzer test. Pet. Appx. at 4. Thus, the Petitioner's request that the Court now hold that his right to counsel attached *after* he refused that test (at what he calls the conclusion of the initial police investigation) by "a specific expansion of the *Wade-Kirby* [*v. Illinois*, 406 U.S. 682 (1972)] cases under the Sixth Amendment[,]" Pet. at

8, simply was not decided by the Arkansas Supreme Court. To the contrary, that court concluded that the Petitioner offered no argument or authority as to prejudice from counsel's absence after he was jailed following his test refusal. Appx. at 4 & n.2. In other words, the court could not conclude that derogation of his right to a fair trial was at risk under *Wade* because his reliance on his test refusal to show prejudice was undeveloped. *Id.* In short, the Petitioner's claim that the Sixth Amendment right to counsel attaches in DWI cases at the conclusion of the so-called initial police investigation was not decided by the Arkansas Supreme Court.

Moreover, as this Court has recognized, Arkansas is one of the many states that provide for the appointment of counsel at least by an initial judicial appearance. *Rothgery v. Gillespie County, Tex.*, 554 U.S. 191, 203-04 n.14 (2008). Here, as the Arkansas Supreme Court explained, however, no first appearance was held because the Petitioner was not jailed pending trial, but pending sobriety and release on citation, Appx. at 4 n.3, making it unnecessary that he appear before a judicial officer to advise him of any rights under Arkansas Rule of Criminal Procedure 8.3. Even if the Petitioner is correct that Arkansas law governing DWI prosecutions compelled his prosecution once he was arrested and cited for it as an equivalent to the initiation of adversarial judicial proceedings under *Wade* and *Kirby*, *see* Pet. at 8, the Arkansas Supreme Court certainly did not reach or decide the point as a matter of federal law

now subject to this Court's review, and this Court, of course, would not decide the matter of federal law on the vagaries of any one state's law. *See, e.g.*, *Rothgery*, 554 U.S. at 199 n.9 & 207. In any event, it is a less than certain proposition that Ark. Code Ann. §5-65-107 compels a commitment to prosecution in all conceivable circumstances as a matter of federal constitutional law, as judicial dismissal on motion may be appropriate in a given case. *See* Ark. A.G. Op. No. 1991-080.

The Petitioner's broader due-process claim to a right to obtain exculpatory evidence also was not reached by the Arkansas Supreme Court. That Court concluded that the Petitioner had made no request for an opportunity to collect such evidence, and it would not reach his various federal and state claims to a right to do so. Appx. at 4-5. The Petitioner's complaint with that resolution, Pet. at 16-17, comes too late in this Court. Had it any merit, he should have pursued it in a petition for rehearing before the Arkansas Supreme Court. In short, this Court cannot answer the question the petition appears to ask as a due-process matter because it was not properly presented to and decided by the Arkansas Supreme Court.[1]

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[1] Apart from falling outside the Court's jurisdiction under 28 U.S.C. §1257(a), the Petitioner's due-process claim mistakenly relies on the framework of *Mathews v. Eldridge*, 424 U.S. 319 (1976). Pet. at 11-14. Given the substantial commitment to criminal trial protections in the Bill of Rights, the Court has rejected simply importing the *Mathews* analysis into

(Continued on following page)

2. The Petitioner's Critical-Stage Right-To-Counsel Claim Raises Neither An Important Constitutional Question Nor A Significant Lower Court Split Of Authority And Was Correctly Decided By The Arkansas Supreme Court.

This Court has settled for the Nation's lower courts that there is no Sixth Amendment right to counsel when a defendant is confronted with the decision whether to take a breathalyzer test by its dismissal of an appeal raising that question for want of a substantial federal question. *See Nyflot v. Minnesota Commissioner of Public Safety*, 474 U.S. 1027, 1027 (1985); *see also, e.g., Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam) (observing that dismissals for want of a substantial federal question reject the specific challenge presented and prevent lower courts from coming to an opposite conclusion on the precise issue); *see generally* E. Gressman, K. Geller, S. Shapiro, T. Bishop, & E. Hartnett, *Supreme Court Practice* 306-10 (9th ed. 2007).

Perhaps recognizing as much, the Petitioner ultimately does not ask that the precise question settled for the lower courts by *Nyflot* be disturbed now. Rather, he asks the Court to find that a right to counsel exists a short time later because, as he posits, the decision below has made the split of lower court

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criminal-procedure settings, *see, e.g., Medina v. California*, 505 U.S. 437, 442-44 (1992), and the Petitioner provides no compelling reason for the Court to do so here.

authority suggested by the dissenters in *Nyflot* worse "by not allowing the right to counsel even after the police investigation has concluded." Pet. at 19.[2] Thus, even while pointing to *Nyflot* as authority for a split in the lower courts, he persists in asking the Court for a different rule – "that after the initial police investigation is concluded [*after* his breathalyzer refusal here], the arrested person should have a reasonable opportunity to contact his attorney so that the attorney could arrange for the collection of any exculpatory evidence, and to provide any necessary legal advice and assistance." Pet. at 20-21. As explained, *supra*, such a ruling founded in either a right-to-counsel attachment claim or any due-process claim was not decided by the Arkansas Supreme Court. Any such ruling founded on a critical-stage right-to-counsel claim can hardly be decided without first "extend[ing] the right to counsel to a point earlier than formal judicial proceedings[,]" which the Court previously has rejected doing. *Rothgery*, 554 U.S. at 209 (citing *United States v. Gouveia*, 467 U.S. 180 (1984)); *see also id.* at 211-12 & nn.15 & 16 (noting that attachment and right to postattachment presence of counsel at critical stages are different enquiries and describing several of latter).

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[2] The suggestion that the Petitioner was denied counsel indefinitely after the police investigation concluded is hyperbolic. As explained, *supra*, Arkansas by court rule provides for the appointment of counsel by the requirement of a prompt first appearance, which was obviated in the Petitioner's case given his release on citation nine hours after his DWI arrest.

Even if the Court concluded that the petition raised the precise question from *Nyflot*, it should be denied. Contrary to making anything worse, as the Petitioner claims, the court below was correct, as it was 25 years before, that the want of Sixth Amendment counsel after a DWI arrest until release on citation a short time later (here nine hours) does not risk derogation of a later fair trial. A decision *consistent* with *Nyflot* hardly changes the status quo ante as to any split identified in the lower courts when *Nyflot* was decided. Indeed, the petition identifies only two states with cases decided after *Nyflot* reaching a contrary result. Moreover, the one upon which he "is relying most heavily," Pet. at 11, *State v. Carr*, 128 Idaho 181, 911 P.2d 774 (Idaho Ct. App. 1995), wrongly employs *Mathews* to resolve the question as a due-process matter. Pet. at 11-12. And, in any event, the Idaho Supreme Court's later opinion in *State v. Harmon*, 131 Idaho 80, 86-87, 952 P.2d 402, 408-09 (1998), recognized that there is no Sixth Amendment right to counsel before a blood-alcohol test is administered. In the end, the Petitioner points only to a decision of the Arizona Court of Appeals to pad the minor split suggested by the *Nyflot* dissent. Pet. at 18. That court, however, since has held that the Sixth Amendment does not entitle an alleged drunk driver to counsel at the time of his or her initial appearance, while he or she is in the sheriff's custody, or when he or she is being readied for the initial appearance. *State v. Weiss*, 232 P.3d 1259, 1262 (Ariz. App. 2010). In any event, any alleged disagreement between the decision in this case and the decisions of intermediate

state appellate courts, does not merit this Court's review. *Cf.* Supreme Court Rule 10(b) (conflict between state courts of last resort and United States court of appeals as among characteristics considered by Court for discretionary review).

The Respondent's research reveals that, in decisions since *Nyflot*, the states almost universally agree that there is no Sixth Amendment right to counsel before a suspect takes a breathalyzer test and that any right to counsel at an earlier point in time derives from state law, and not the Sixth Amendment. For a typical instance, in *Porter v. State*, 732 So.2d 899, 904 (Miss. 1999), the Mississippi Supreme Court noted that the Sixth Amendment right to counsel attaches once the state begins criminal proceedings, but it held that the right to counsel under Mississippi law attaches earlier, when the proceedings reach "the accusatory stage," defined as occurring when a warrant is issued or by binding over or compelling the accused to answer the offense. Similarly, in Oregon, an accused drunk driver's right to counsel before deciding whether to submit to a breathalyzer test is based on that state's constitution, rather than the Sixth Amendment. *State v. Dumford*, 149 Or. App. 1, 5, 941 P.2d 1042, 1044-45 (1997). *Accord State v. Koppi*, 779 N.W.2d 562, 569 (Minn. App. 2010); *State v. Delisle*, 137 N.H. 549, 551-52, 630 A.2d 767, 768 (1993); *State v. Berger*, 623 N.W.2d 25, 30 (N.D. 2001). In short, the *Nyflot* question remains insubstantial and the lower courts largely resolve the issue as a matter of state law and do not need a Sixth

Amendment course correction from this Court. The majority view adopted by Arkansas is correct, and any divergence of lower court authority on the question does not represent a wide split on an important question of federal constitutional law.[3]

Finally, the Arkansas Supreme Court was correct that the Petitioner's right to a fair trial was not at risk of derogation under the Sixth Amendment for the want of counsel when he was confronted with the decision whether to take a breathalyzer test following his DWI arrest. Indeed, he was advised by the arresting officer that his refusal to submit to a breathalyzer test would result in the suspension of his driving

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[3] The petition discusses several state-court decisions, not apparently in support of a split of authority but to suggest fault by the court below for not distinguishing them. Pet. at 10-11. Although that discussion's failure to demonstrate a reason to grant the petition merits no further response, its reliance on two authorities briefly does. As he did in the court below, the Petitioner relies on *State v. Hill*, 277 N.C. 547, 178 S.E.2d 462 (1971), and *City of Tacoma v. Heater*, 67 Wash.2d 733, 409 P.2d 867 (1966), but the issue has been revisited in both states. In North Carolina, the state legislature responded to *Hill* by statutorily changing its "*per se* prejudice" rule to provide that denial of access to counsel was "no longer inherently prejudicial to a defendant's ability to gather evidence in support of his innocence in every driving while impaired case." *State v. Knoll*, 322 N.C. 535, 545, 369 S.E.2d 558, 564 (1988). The North Carolina state legislature, obviously, would have no authority to change a right guaranteed by the Sixth Amendment. In *Prok v. State*, 107 Wash.2d 153, 155-56, 727 P.2d 652, 654 (1986), the Washington Supreme Court explained that the right to counsel accruing when a person is taken into custody is based on that state's criminal-procedure rules.

privilege and that if he took the test he could pay for an alternative test of his own, and he initialed and signed a form indicating he was so advised. *See* Respondent's Appx. A1. To conclude that the Petitioner was entitled to counsel at that time (or even during the nine hours he was jailed until his release on citation, as he asks in his proposed rule) would require rejection of the long-settled view that the Sixth Amendment right to counsel for the accused's defense "means defense at trial, not defense in relation to other objectives that may be important to the accused." *Rothgery*, 544 U.S. at 216 (Alito, J., concurring) (citing *Gouveia*).

Moreover, concluding that the right to counsel so existed only for DWI cases – or only as to blood-alcohol-content testing – is an especially dubious proposition. It would be passing strange that, while the collection of such evidence or evidence of the refusal to permit its collection infringes neither an accused's Fourth nor Fifth Amendment rights, *see Schmerber v. California*, 384 U.S. 757 (1966), *South Dakota v. Neville*, 459 U.S. 553 (1983), the decision confronting the accused as to its collection nevertheless requires the advice of Sixth Amendment counsel.

CONCLUSION

The petition for a writ of certiorari to the Arkansas Supreme Court should be denied.

Respectfully submitted,

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APPENDIX
STATE'S EXHIBIT 1

A1

NAME GREGORY FORRESTER
DL# 919495001
DOB 1/7/68
DATE 12/1/07
TIME OF INCIDENT 0008

STATE'S EXHIBIT

[CR08-789-1]

Any person who operates a motor vehicle or who is in actual physical control of a motor vehicle in this state shall be deemed to have given consent to a chemical test or tests of his or her blood, breath or urine, for the purpose of determining the presence and amount of alcohol, controlled substance, or any other intoxicant.

1. GF If you refuse to take the test or tests, **none will be given**, but you will be in violation of Arkansas Code Annotated §5-65-205, Refusal to Submit, and your driving privilege will be suspended or revoked pursuant to Arkansas Code Annotated §5-65-402.

2. GF If you choose to take the test or tests, and the results reflect an alcohol concentration of eight hundredths (.08) or more, or the presence of a controlled substance, or any other intoxicant, your driving privilege will be revoked or suspended pursuant to Arkansas Code Annotated §5-65-104.

3. ____ If you choose to take the test or tests, and the results reflect an alcohol concentration of four hundredths (.04) or more or the presence of a controlled substance, or any other intoxicant for a violation occurring in a commercial vehicle, OR the results reflect an alcohol concentration of eight hundredths

(.08) or more, or the presence of a controlled substance or any other intoxicant for a violation occurring in a non-commercial vehicle, your commercial driving privilege will be disqualified pursuant to Arkansas Code Annotated §27-23-112.

DUI

4. _____ If you are under age 21 and you refuse to take the test or tests, **none will be given**, but you will be in violation of Arkansas Code Annotated §5-65-310, and your driving privilege will be suspended pursuant to Arkansas Code Annotated §5-65-310.

5. _____ If you choose to take the test or tests, and you are under age 21 and the results reflect an alcohol concentration of two hundredths (.02) but less than eight hundredths (.08), your driving privilege will be suspended or revoked pursuant to Arkansas Code Annotated §5-65-304.

If you take the test or tests requested by law enforcement, you may also, at your own expense, have a physician, registered nurse, lab technician, or other qualified person administer an additional breath, blood, or urine test. This department will assist you in obtaining such a test. Pursuant to Act 561 of 2001, if you choose to have an additional test, and are later found "**Not Guilty**" of violation of the Omnibus DWI Act, for this arrest, the arresting law enforcement agency will reimburse you for the cost of the additional test.

DO YOU UNDERSTAND ALL PARTS OF THESE RIGHTS? ✓ YES _____ NO

WILL YOU TAKE THE TEST/ TESTS? _____ YES ✓ NO

Observation time beginning:
_____ (am / pm)

Time of test:
_____ (am / pm)

DO YOU WANT ANOTHER TEST AT YOUR EXPENSE? _____ YES _____ NO

(Breath, Blood, Urine) Time of test _____ (am / pm)

/s/ Greg Forrester
Signature of Subject

/s/ [Illegible] #1603
Signature of Officer

12/1/07 0053
Time

/s/ _____
Signature of Witness

Supreme Court, U.S.
FILED
DEC 3 - 2010
OFFICE OF THE CLERK

No. 10-372

In The

Supreme Court of the United States

GREGORY FORRESTER,

Petitioner,

v.

STATE OF ARKANSAS,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Arkansas

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY ARGUMENT

The Respondent asserts that the ruling in *Rothgery v. Gillespie County, Texas*, 554 U.S. 191 (2008) supports its position that the Petitioner did not have a right to counsel after his arrest for driving while intoxicated and thus there is no federal question for this court to decide. The type of issue presented in this case was illustrated in the concurring opinion.

" . . . we have recognized that certain pretrial events may so prejudice the outcome of the defendant's prosecution that, as a practical matter, the defendant must be represented at those events in order to enjoy genuinely effective assistance at trial." 554 U.S. at 217. Examples are pretrial lineups, preliminary hearings, pretrial psychiatric exam, interrogation, etc.

Since a person only has a very short time frame to gather exculpatory evidence in a drunk driving case, the guiding hand of counsel is either do or die in the few short hours after the suspect is arrested. This is certainly not the precise issue in *Rothgery*, which was a right to the appointment of counsel for an indigent suspect not charged with drunk driving. The time frame for gathering exculpatory evidence however should be just as important as the pretrial issues of lineups, *Miranda* warnings, etc. noted by the concurring justices in *Rothgery*.

The Respondent believes that a defendant does not have the right to counsel before deciding to take an alcohol test as requested by the officer. Its argument is that *Nyflot v. Minnesota Commissioner of Public Safety*, 474 U.S. 1027 (1985) has settled the issue and a person does not have the right to counsel *prior* to deciding to take the alcohol test. Both the Supreme Court of Arkansas and the Respondent fail to grasp the concept that the attorney requested by the Petitioner shortly *after* the police investigation is finished could be a "fact" witness and not solely acting as counsel under the Sixth Amendment. In other words, the attorney could simply be a conduit through which exculpatory evidence flows. If a person wants to call an attorney for the purpose of having the lawyer come to the jail and take photos of the suspect's eyes, make a video tape of the suspect's sobriety, perform field sobriety tests, or bring money so that an independent alcohol test can be purchased, then the attorney will be a "fact" witness that testifies at trial and does not participate as trial counsel.

In a case decided after *Nyflot*, the Maryland high court ruled that a person has a due process right to counsel before deciding to take an alcohol test. *Brosan v. Cochran*, 307 Md. 662, 516 A.2d 970 (1986). Cochran was an attorney who took his own portable breath test machine to the jail when called by a drunk driving suspect. The Maryland high court ruled that a suspect would have a right to a face-to-face meeting with the attorney under the due process clause and could take the attorney's breath

test before taking the state requested test if there was not an unnecessary delay in taking the state requested test. If Respondent's argument is correct that *Nyflot* bars the right to counsel before a suspect is required to decide whether or not to take a chemical sobriety test, then *Brosan v. Cochran*, *supra*, needs to be overturned.

In an effort to gather exculpatory evidence at 1:00 a.m. who could the arrested drunk driving suspect call to help gather exculpatory evidence? He certainly is not going to call Joe-the-Plumber. He most likely needs to call an attorney who will know what to do to help the defendant's case regardless of whether that particular attorney would later represent him at trial.

As a practical matter, friends and relatives of persons arrested for drunk driving are not going to have access to the suspect at the times that most DWI suspects are arrested. It is unrealistic to think that a person presenting himself to a jail at 1:00 a.m., telling the jailor that he is the suspect's brother-in-law, friend, co-worker, etc., and is there for the purpose of seeing the suspect in an effort to "gather exculpatory evidence," will actually be allowed into the jail for that purpose. The jailor's response will be that visiting hours are over and the interested person might want to just check back later in the morning. The problem is that later that morning is just too late to gather exculpatory evidence in most drunk driving cases. On the other hand, lawyers are generally able

to see an arrested person just about any time of the day or night.

If the purpose of the criminal justice system is to convict the guilty, but not the innocent, and to provide fair trials to all accused persons, then there is absolutely no reason to deny anyone the right to call an attorney from jail in an effort to gather exculpatory evidence under the Sixth Amendment. The Respondent has failed to advance any reason to deny a person the right to telephone an attorney for a person arrested for drunk driving.

One of the main cases that the Petitioner relies on for relief is *State v. Carr*, 128 Idaho 181, 911 P.2d 774 (Idaho App. 1995). In *Carr*, the court ruled that the proper analytical framework for a due process/ right to counsel violation in a drunk driving case is found in *Mathews v. Eldridge*, 424 U.S. 319 (1976). The Respondent counters that the *Carr* court was in error on this point and that the controlling law is found in *Medina v. California*, 505 U.S. 437 (1992). (Opp. 7, footnote) The *Medina* court stated, "In the field of criminal law, we "have defined the category of infractions that violate 'fundamental fairness' very narrowly" based on the recognition that, "[b]eyond the specific guarantees enumerated in the Bill of Rights, the Due Process clause has limited operation." 505 U.S. at 443. Since the right to counsel and the right to gather exculpatory evidence are found in the Sixth Amendment, *Medina* in fact recognizes that the *Carr* court was correct to use the *Mathews* balancing test.

The Respondent has changed the question presented as filed by the Petitioner from a Fifth Amendment due process violation to a Fourteenth Amendment issue. (Opp. i) The Respondent is correct in making that change. The Petitioner made the due process argument referred to in *State v. Carr, supra,* but improperly noted in its brief that it was a Fifth Amendment due process argument. The *Carr* case was argued both at the trial level and at the Supreme Court of Arkansas, so the Fourteenth Amendment issue is properly before this Court.

The Respondent did not disagree with the Petitioner's position that Arkansas law requires a person "arrested" for drunk driving to be tried on that charge or he must plead guilty to that charge. The police and prosecutors *are prohibited* from reducing or dismissing drunk driving charges. That is black letter law in Arkansas. Arkansas Code Annotated 5-65-107. No case cited by the Respondent addresses the exact legal issue of the attachment of the right to counsel under the facts and law of this case.

Some states have statutes that allow suspected drunk drivers to use a phone to contact their lawyers from jail shortly after their arrest. However, many drunk driving suspects face the same dilemma as the Petitioner. Being placed in jail for drunk driving without the benefit of counsel or the right to use a phone to contact any person who could provide exculpatory evidence is the antithesis of fair play. The only logical reason for preventing an arrested drunk driving suspect from contacting an attorney is that

the police don't want the suspect to be able to gather any evidence that contradicts the police evidence. Incommunicado detention of a criminal suspect by the police, in an effort to prejudicially impair his ability to present his defense under the Sixth Amendment, is an affront to a free and just society. It really is just that simple.

The Supreme Court of Arkansas was fairly presented the issue of whether the police can hold a drunk driving suspect incommunicado and can refuse his request to use a telephone to contact an attorney after the police investigation had been completed. The answer is that the police can refuse to let the suspect use the phone to call an attorney because the Supreme Court of Arkansas did not see how "counsel's absence at the time he was jailed might derogate from his right to a fair trial." (App. 1) This was a clear rejection of the Petitioner's arguments made at the trial court and the Arkansas Supreme Court. The Petitioner does not have the ability to make the Arkansas Supreme Court make a more detailed ruling. The Respondent's main argument is that the ruling of the Arkansas Supreme Court forecloses review by the United States Supreme Court on an issue of federal constitutional interpretation. If this were taken to its logical conclusion, any state supreme court could always dodge any federal question presented by the parties and that would be the end of the appeals process.

This case started out in the Arkansas Court of Appeals. The lawyers representing the parties both filed written briefs and made oral argument. After oral argument, a three judge panel of the Court of Appeals transferred the case to the Supreme Court of Arkansas because the case involved an issue of first impression, a matter of federal constitutional interpretation, a substantial public interest, a significant issue needing clarification, and overruling precedent. After the case had been transferred to the Supreme Court of Arkansas, inexplicably, the court issued an order denying oral argument before any briefs had been filed and before either party made any request to have oral argument. Oral argument was never made in the Supreme Court of Arkansas. All of this is on the Arkansas Judiciary website under case no. CR-09-872. This case was fully developed in both the Arkansas Court of Appeals and the Supreme Court of Arkansas and the Respondent has not sufficiently challenged that issue.

The Supreme Court of Arkansas ruling how "counsel's absence at the time he was jailed might derogate from his right to a fair trial" is absolutely puzzling. The police have in custody a person whom they think is intoxicated, and that person attempts to reach out and get assistance from the one person our society recognizes as the best person to help a drunk driving suspect, and yet that contact is now effectively prohibited. The Arkansas Supreme Court ruled that you must prove how you were prejudiced before

you get the right to access the exculpatory evidence. That is like putting a person in a round room and telling them to go sit in the corner. Somehow the court never grasped the concept of exculpatory evidence that is now gone forever, thus precluding the Petitioner from ever receiving a fair trial.

Whittling this case down to its most basic complaint is the issue of gathering exculpatory evidence. Twisting the facts somewhat, suppose that a lawyer specializing in drunk driving cases gets arrested for drunk driving and is not allowed to use the phone to gather exculpatory evidence. The convicted attorney was a man who knew how to save himself, but lacked the ability. No doubt he would feel like a character in a Franz Kafka novella.

In *Payne v. Arkansas*, 356 U.S. 560 (1958), the defendant gave a coerced confession to a murder. The main problem was that the confession was given under the threat of mob violence directed at the defendant himself. The court noted that there were several factors that added to the finding of coercion, but one that stands out, related to the issues of the present case, was the fact that the defendant was not allowed to use the telephone to call anyone prior to the confession. The defendant " . . . was held incommunicado for three days, without counsel, advisor or friend, and though members of his family tried to see him they were turned away, and he was refused permission to make even one telephone call . . . " 356 U.S. at 567. Little has changed in Arkansas in the past 52 years.

CONCLUSION

The Petition for Certiorari should be granted for all the reasons listed in Petitioner's Opening Brief and many of the same reasons that the Arkansas Court of Appeals transferred the original case to the Supreme Court of Arkansas. Those reasons being a case involving a matter of federal constitutional interpretation, of a substantial public interest, presenting a significant issue needing clarification, and the possible overruling of precedent. The Petitioner respectfully requests that this Court grant the Petition for Certiorari.

Respectfully submitted,

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